Filed 7/27/10 Castaneda v. Denny's Inc. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FILIBERTO CASTANEDA et al., Plaintiffs and Appellants, v. DENNY'S INC., Defendant and Respondent.	B215899 (Los Angeles County Super. Ct. No. PC038424)

APPEAL from a judgment of the Superior Court of Los Angeles County. John P. Farrell, Judge. Affirmed.

Henry W. Bockman for Plaintiffs and Appellants.

Diane M. Matsinger; Reid & Hellyer and Terry Bridges and for Defendant and Respondent.

* * * * * * * * *

Plaintiffs, Filiberto Castaneda, Yolanda Salmeron, and Brigitte Dollarhide appeal from a judgment on special verdict in favor of their former employer, defendant Denny's Inc. (Denny's), in an action for retaliatory discharge in violation of public policy and of Labor Code section 1102.5, subdivision (c).[1] Plaintiffs claim errors in the giving and refusal of jury instructions, and in the form of the special verdict.

Plaintiffs were discharged from their employment as food servers (servers) at the Denny's restaurant in Newhall (the restaurant). Plaintiffs were discharged after they walked off the job and left the premises on Sunday, July 3, 2005. Plaintiffs contended that they were discharged because of their refusal to serve food with tableware that they believed to be unsanitary because the plates and utensils were washed without dish soap. Denny's contended that the terminations were motivated solely by plaintiffs' walkout and abandonment of their jobs. Denny's also presented evidence that no customers were served food with unwashed tableware. The jury found that plaintiffs' alleged refusal to serve food with tableware they believed to be unsanitary was not a motivating reason for Denny's decision to discharge plaintiffs.

We find no reversible error and affirm the judgment.

FACTS

Plaintiffs left the restaurant at about 9:30 a.m. on July 3, 2005, the Sunday of Independence Day weekend, an extremely busy morning. There was no dispute that at the change of shift earlier that morning, bus trays with unwashed tableware were stacked up in the dishwashing machine area, as well as under the counter.

Each plaintiff testified about what led up to his or her walking out. So did Anna Castillo, another server who was terminated along with plaintiffs after she walked out with them. Castillo originally had been a plaintiff in the case, but her claim had been

---

[1] Undesignated section references are to the Labor Code. Section 1102.5 provides in part: "(c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

resolved. She testified that on July 3, 2005, she began work at 6:00 or 7:00 a.m. At about 9:00, her food orders were not ready on time, and she asked the cooks why. They told her they had no dishes. Castillo inquired of busboy Eliceo Hernandez, who was in charge of washing the restaurant's dishes. According to Castillo, Hernandez stated he did not have soap for the dishwasher, and there had been none since he arrived at 7:00 a.m. Castillo saw no soap, a pink substance, in the dishwasher's container. However, she testified, the machine was running.

Castillo spoke to the manager, David Bambaeerow, between 9:00 and 9:15 a.m. She told him there was no soap in the machine, and he replied, "Really?" She then told him she was leaving, because she could not work without soap in the machine. Castillo was upset because she believed she had already served orders on unsanitary dishes. On cross-examination, Castillo acknowledged that before she spoke to Hernandez, no customers had complained to her about dirty dishes, nor had any of the plaintiffs. She noted, however, that the dishwasher sprayed water powerfully, so that a dish could appear clean even if not properly sanitized.

Plaintiff Dollarhide testified that when she arrived for work at 7:00 a.m. on July 3, 2005, the restaurant was dirty, with bus trays stacked on the ground in an unsanitary position; they should have been at least six inches above ground to avoid pests and permit sweeping. Dollarhide had been sent by Denny's for training in 2003, by which she obtained "ServSafe" and food handler certificates, attesting to her knowledge of sanitary food service practices. The "ServSafe" certificate was displayed on the restaurant's wall.

Dollarhide testified she was in the breakroom at 9:00 a.m., when Castillo entered, crying and saying that, among other things, there was no soap. Dollarhide went to the dishwashing machine and saw that it was running but had no soap. Dollarhide "panicked," because she would soon resume serving, and she believed she had already been serving on unwashed dishes. At about 9:30, Dollarhide stated, she saw Bambaeerow and told him that if they did not stop serving on unclean dishes, she would leave. She turned to go, and Bambaeerow said, "You can't do this to me." Dollarhide proceeded to walk out of the restaurant, Castillo beside her.

Plaintiff Castaneda arrived at the restaurant on July 3, 2005, at 7:00 a.m. The restaurant was a mess, and he saw Hernandez contending with trays of dirty dishes. A little before 9:00, Castaneda heard from one of the other plaintiffs that there was no dishwasher soap. He asked Hernandez, who replied that there was not, but that Bambaeerow had gone to get some. The soap container of the dishwasher was empty. A little after 9:00, Castaneda testified, he saw Bambaeerow enter the restaurant. Castaneda began serving again, but he heard Salmeron say there was still no soap in the machine. Castaneda returned to the dishwasher, and saw the container still without pink soap. He went to Bambaeerow's office and told him he was going to leave, because he was concerned about the customers' health. Castaneda then gave his customers their checks, and walked out of the restaurant.

Plaintiff Salmeron testified that at about 8:45 a.m. on July 3, she went looking for Bambaeerow, because she had heard they were serving on dirty dishes. Unable to find him, she went to the dishwashing area and spoke with Hernandez. He said Bambaeerow had gone to get soap. Salmeron looked at the machine, which was running, and did not see soap. Expecting, however, that Bambaeerow would replace the soap, Salmeron resumed serving. After perhaps 20 minutes, Castillo told Salmeron it was possible they had been serving on dirty dishes, without soap. Castillo added that Hernandez had said they had been so serving since 7:00 a.m. Salmeron returned to Hernandez and saw no soap, only empty containers. She asked Hernandez where Bambaeerow was, and he pointed to the office.

Salmeron went there and told Bambaeerow they had been using unsanitized dishes, and she would leave if he didn't do something about it. He replied, "Really?" She said, "Yes," and proceeded to give her customers their checks. Salmeron testified she and the others briefly discussed what to do, then went to Bambaeerow's office. They told him they would have to leave because he had done nothing about the problem, and they would not serve on contaminated dishes. Bambaeerow replied, "You can't do that to me." Salmeron then walked out of the restaurant, at about 9:30.

Norma Akopyan, Bambaeerow's supervisor, testified that on the morning in question, Bambaeerow had phoned her at home and told her that servers had walked out. She arrived at the restaurant between 9:30 and 10:00 a.m. The hostess and a server told her that other servers had left because there were no dishes. After regional manager Barbara Randolph arrived, Bambaeerow said the servers had left after he returned to the restaurant with soap. Akopyan obtained written statements from the remaining employees, and she determined that plaintiffs and Castillo had left because of a lack of dishes with which to serve. She acknowledged that on July 4, Salmeron came in and wrote on a performance record that there had been no soap or clean dishes, and she was unwilling to jeopardize customers' health by serving on dirty plates.

On July 5, Randolph told Akopyan the four servers were to be discharged for job abandonment. Akopyan testified that when one walks off the job, one fires oneself, regardless of the reason. In excerpts from Randolph's deposition, which were read because she was unavailable, Randolph stated that she had been informed by Akopyan, and also by the plaintiffs, that the reason for the walkout was that plaintiffs thought they had been serving on dirty dishes. Randolph testified that if plaintiffs had not walked out of the restaurant, they would not have been terminated.

Bambaeerow also testified by deposition, because of serious illness. In portions introduced by plaintiffs, he stated that at about 7:15 to 7:30 a.m., Hernandez informed him that the detergent was about to run out. Bambaeerow testified he left to get more between five and 10 minutes after Hernandez told him about the problem.

Hernandez testified that he arrived at 7:00 a.m. on July 3, to run the dishwasher. After about an hour, Hernandez noticed that the machine was low on soap. Checking the storeroom and finding none, he told Bambaeerow that they were almost out of soap. Bambaeerow said he would go get some, and that when the machine ran out of soap, Hernandez should stop running it. Hernandez testified that the machine did run out of soap, and he then stopped washing. Bambaeerow returned with soap, and Hernandez resumed washing with the soap. In the interim, he stated, Castaneda and Salmeron came

to him requesting plates, and he told them he could not wash any. Dollarhide also told him she needed plates that morning, but he could not supply her.

In deposition testimony that Denny's introduced, Bambaeerow confirmed that he told Hernandez not to run the dishwasher if the soap ran out. Bambaeerow further testified that he called the Sylmar Denny's restaurant, a few miles away, and drove there to get soap. When he returned with it, Hernandez was not washing. Mary Goode, a Denny's general manager, testified that on the morning of July 3, 2005, Bambaeerow arrived at the Sylmar restaurant before 9:00, she gave him some Ultraclean, the red dish soap for the dishwasher, and Bambaeerow left immediately.

DISCUSSION

1. Preliminary Matters.

Before considering plaintiffs' specific assignments of error,[2] we take note of the legal basis of plaintiffs' case.

Plaintiffs' operative, fourth amended complaint alleged that Denny's had terminated plaintiffs in retaliation for their refusal to commit acts unlawful under the Health and Safety Code, and the terminations therefore violated both section 1102.5, subdivision (c) (*ante*, fn. 1) and California's public policy against service to the public of impure food or of food on unwashed utensils. These statutory and common law "*Tameny*" claims for retaliatory discharge for refusal to engage in unlawful conduct share essentially the same elements, and the complaint set forth both, albeit conjunctively. (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 252, p. 327; cf. § 1102.5, subd. (c) with *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178.)

Denny's contends, incorrectly, that plaintiff did not plead (or pursue) a statutory cause of action. Plaintiffs did not simply cite section 1102.5 in the caption of the complaint, as Denny's argues. They separately alleged that Denny's retaliatory termination violated subdivision (c) of the statute. And while other subdivisions of

---

[2] The first three "issues" that plaintiffs expound in their opening brief consist of observations about the law and the record, without any assertion of error below. These "issues" do not require discussion.

section 1102.5 concern "whistleblowing," subdivision (c) proscribes retaliation against an employee for refusing to perform conduct that would violate a state or federal statute, rule, or regulation. Although plaintiffs' statutory theory of liability was cumulative of their common law theory (or vice-versa), plaintiffs alleged both.

2. Alleged Instructional Errors.

a. Liability Instructions.

The trial court's instructions to the jury regarding liability were clear and succinct. First, the court gave a modified version of Judicial Council of California Civil Jury Instructions (CACI) No. 2430, the standard instruction on the elements of wrongful termination in violation of public policy. As streamlined by omission of the uncontested elements that Denny's had employed and discharged plaintiffs, the instruction stated that to prove their claims of discharge in violation of public policy, each plaintiff had to show, "1. That plaintiff's refusal to serve food on dishes that plaintiffs reasonably believed were unsanitary or in violation of the Health and Safety [Code] provisions I will read to you was a motivating reason for that plaintiff's discharge; and [¶] 2. That the discharge caused that plaintiff harm."

Immediately after CACI No. 2430, the court delivered CACI No. 2507, which defines "motivating reason" as "a reason that contributed to the decision to take certain action, even though other reasons also may have contributed to the decision." The court also instructed the jury that on July 3, 2005, the Health and Safety Code then in force required that food must be pure, free from contamination, and fully fit for human consumption, and that all utensils--including tableware, cutlery, glassware, and any other item with which food comes in contact--"shall be both cleaned and sanitized before reuse." The instruction concluded, "The foregoing represents the public policy of the State of California in the above areas."

In their appellants' opening brief, plaintiffs originally asserted that the giving of CACI No. 2430 was error, because the instruction did not incorporate their statutory cause of action under section 1102.5, subdivision (c). After Denny's pointed out that plaintiffs had requested CACI No. 2430 (see *Gherman v. Colburn* (1977) 72 Cal.App.3d

544, 567), plaintiffs in their reply brief restated their position to be that it was error to give CACI No. 2430 without certain other proposed instructions, the omission of which plaintiffs had independently challenged. We therefore turn to those alleged errors.

Plaintiffs complain of the absence of instructions using the term "protected activity." Plaintiffs requested an instruction on the elements of liability that was drawn in part from BAJI No. 12.10, which concerns retaliation forbidden by the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; FEHA). (See Gov., Code, § 12940, subd. (h).) Plaintiffs' requested instruction would have required them to prove that (1) plaintiffs engaged in a legally protected activity, (2) Denny's subjected them to an adverse employment action, (3) plaintiffs' protected activity was a motivating reason for that action, and (4) the adverse action caused plaintiffs to suffer injury. The instruction also would have defined as "protected activity" a plaintiff's refusal to serve contaminated food to the public or to violate the Health and Safety Code. In addition, the proposed instruction included two paragraphs of text defining "adverse employment action."

The court properly refused plaintiffs' instruction, for several reasons. First, this was not a FEHA retaliation case. Second, even for that kind of case, the preferred form jury instruction (see Cal. Rules of Court, rule 2.1050), CACI No. 2505, instructs that the "protected activity" is to be described to the jury, and not referred to by that abstract term. And that is precisely what the trial court's version of CACI No. 2430 did here. That instruction was a straightforward, jargon-free description of the same requisites of liability that plaintiffs' proposed instruction would have expounded in a far more convoluted fashion. The trial court recognized this, when it noted the instruction was "refused but included in part in [CACI No.] 2430."

Plaintiffs complain of the court's refusal to give another requested instruction which would have declared that a restaurant server's refusal to act in violation of Health and Safety Code provisions or California public policy relating to service of pure food constituted "protected activity." This effort to inject the terminology of "protected activity" was also superfluous in light of the court's liability instructions. Those instructions clearly stated that Denny's would be liable for damages if the jury found any

plaintiff's refusal to serve food on unsanitary dishes or to violate the Health and Safety Code was a motivating reason for Denny's discharge decision. We agree with the authors of CACI Nos. 2430 and 2505 that there is no compelling significance in the term "protected activity," and that a jury in an employment retaliation case may be fully and clearly instructed about the elements of liability without employing that term.

b. Section 1102.6.

Plaintiffs next take issue with the trial court's refusal to give requested instructions regarding the burden of proof under section 1102.6.[3] Plaintiffs requested an instruction paraphrasing section 1102.6, together with the form instruction about clear and convincing evidence, CACI No. 201. The trial court gave neither.

Section 1102.6 does not prescribe a clear and convincing evidence instruction in every case where a plaintiff alleges unlawful retaliation for an employee's refusal to violate the law. Instead, section 1102.6 operates when an employee proves his or her retaliation claim, "by a preponderance of the evidence" (*ibid.*), and the employer seeks to avoid liability by proving that the employee would have been legitimately discharged for independent reasons even if the employee had not engaged in the protected activity. Denny's did not defend this case on the theory that it would have terminated plaintiffs even if they had not refused to serve food on unsanitary dishes or refused to violate the health codes. Denny's defended this case on the theories that plaintiffs were not required to, and did not, serve any customers with unsanitary dishes, and it discharged plaintiffs for walking off the job.

Moreover, the jury found plaintiffs' refusal to serve food with unsanitary dishes or in violation of the health codes was not a motivating reason for Denny's decision to

---

[3] Section 1102.6 provides: "In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5."

discharge them. Under section 1102.6, the precondition for the special burden of proof that plaintiffs sought to have imposed is that plaintiffs demonstrate by a preponderance of the evidence that retaliation was a motivating reason for the discharge. Since the jury here specifically found that plaintiffs had not proven this, instructions on the defendant's burden of proof under section 1102.6 were not warranted, and there was no reasonable probability that their absence affected the verdict. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

c. Other Refused Instructions.

Plaintiffs assign error in the court's refusal to give two instructions they requested regarding food safety certification, under former Health and Safety Code section 113716. One instruction stated that as of July 3, 2005, California law required every restaurant to have at least one employee certified in food safety under that law, and the employee's legal responsibilities included ensuring the safety of the restaurant's food preparation and service. The second instruction recited that plaintiff Dollarhide was so certified, that Denny's knew so, and Denny's retained her certification on file at the restaurant, as legally required. The court refused to give these instructions, characterizing them as "pinpoint" and in one case "beyond the evidence."

The refusal was not error. First, the proposed instructions' paraphrase of the statute was inaccurate in several respects. Former Health and Safety Code section 113716, subdivision (a)(1), in effect in July 2005, required that each "food facility" have an *owner or employee* who has passed a certification examination; and subdivision (d) provided that a certified employee's responsibilities "shall include the safety of food preparation and service . . . ," not "ensuring" such safety.[4]

Second, according to plaintiffs, the proposed instructions were intended to affect the jury's evaluation of the reasonableness of Dollarhide's "belief" and "actions . . . in fulfilling her specific responsibilities under law." Plaintiffs were of course free to argue

---

[4] The current, successor statute is identical in both respects. (Health & Saf. Code, § 113947.1, subds. (a), (f).)

that point, by reference to the evidence regarding Dollarhide's certifications. The proposed instructions would largely have echoed the evidence, and would have served only to unfairly emphasize plaintiffs' position.

Plaintiffs also complain of the refusal of a proposed instruction attributing to Denny's any knowledge its managers obtained during their employment.[5] Plaintiffs attribute the instruction to Civil Code section 2332, which provides, "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." The court refused the instruction without prejudice, noting, "need CACI or BAJI format modified."

There is no indication that plaintiffs proposed a revised instruction. Plaintiffs' failure to do so forfeits their claim of error on appeal. Moreover, the court's refusal to give plaintiff's requested version of an agency instruction could not have been prejudicial. As the court said when reviewing its refusal of the instruction, "I just don't think it's really an issue anyway." Plaintiffs have not shown any dispute or conflict about the legal proposition in question.

3. Special Verdict Forms.

Plaintiffs assert that the court's modification of the special verdict forms, with respect to the question of liability, was prejudicially erroneous, and "guaranteed a defense verdict." This contention was waived, by failure to object below, and it also is unmeritorious.

The verdict forms in this case, one for each plaintiff, derived from CACI No. VF-2406, the special verdict form for wrongful discharge in violation of public policy. As

---

[5] "A corporate employer is conclusively presumed to know all facts that any of its managers or supervisors learn while acting during the course and scope of their employment. [¶] In the case before you, DAVID BAMBAEEROW, NORMA AKOPYAN, and BARBARA RANDOLPH were managers and supervisors of DENNY'S INC. [¶] Therefore, any fact that any of them learned while acting as a manager defendant [*sic*] DENNY'S INC. is conclusively presumed to be known by DENNY'S INC."

originally drafted, the first question here inquired whether each plaintiff's "actions in refusing to engage in activity that [he or she] reasonably believed would be the serving of contaminated food to the public [was] a motivating reason for DENNY'S INC. decision to discharge [name of plaintiff]?" As ultimately revised and submitted to the jury, the interrogatory read as follows: "1. Was [name of plaintiff]'s alleged refusal to serve food to the public on utensils such plaintiff reasonably believed was unsanitary or in violation of the Health and Safety Code a motivating reason for DENNY'S INC. decision to discharge [plaintiff]?"

Plaintiffs assign prejudicial error in the changed description of their activity, to "*alleged*" refusal to serve on utensils reasonably believed to be unsanitary or unlawful. They argue that by virtue of the court's insertion of "alleged" before the description of the activity, the verdict form disparaged to the jury, as unproven and "suspiciously claimed," what plaintiffs did, and whether their beliefs were reasonable.

This contention fails for two independently sufficient reasons. First, the record, which includes extensive discussion of the verdict forms leading to their final refinement, just before closing arguments, nowhere shows an objection by plaintiffs to the language they now seek to challenge. Absence of such an objection waives the right to appellate review. (E.g., *Thompson Pacific Construction, Inc. v. City of Sunnydale* (2007) 155 Cal.App.4th 525, 550.)

Second, on the merits, plaintiffs' complaint about the verdict's phrasing is untenable. The court may have inserted "alleged" at the beginning of the instruction in response to CACI No. VF-2406's direction to "*insert <u>alleged</u> activity protected by public policy . . . .*" (Underscore added.) That would not appear improper. But regardless, the juxtaposition of "alleged" in the present verdict simply signified that the claimed activity and reasonable belief were what plaintiffs were asserting, by their case. The leading definition of "alleged" is, "asserted to be true or to exist . . . ." (Webster's 3d New Internat. Dict. (2002) p. 55.) Here, the facts that plaintiffs asserted would not be proved true until the jury so decided. Plaintiffs' claim of prejudice is meritless.

DISPOSITION

The judgment is affirmed. Denny's shall recover its costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

We concur:

RUBIN, ACTING P. J.

FLIER, J.